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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 139

ERIK A. BERTEL, LAURITS SORENSEN, BORGE A. R. JENSEN, HENRY L. LUND and ARNE SORENSEN,

Petitioners,

against

PANAMA TRANSPORT COMPANY, ESSO STANDARD OIL CO. (Chile) S.A.C., formerly WEST INDIA OIL COMPANY CHILE S.A.C., STANDARD OIL COMPANY (N. J.) and STANDARD OIL COMPANY OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT M. BENJAMIN,
ABRAHAM FISHBEIN,
ROBERT T. TATE,
JEROME Y. STURM,
Counsel for Petitioners.

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OCTOBER TERM, 1952

No. .....

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 3, 1953.

Opinions Below

The opinion of the District Court (R. 75-83) is reported in 109 F. Supp. 795. The opinion of the Court of Appeals (R. 87-91) is reported in 202 F. 2d 247.

Jurisdiction

The judgment of the Court of Appeals was entered on March 3, 1953 (R. 91-92). A petition for rehearing filed on March 17, 1953 (R. 93) was denied on March 30, 1953 (R. 107). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Whether on facts uncontroverted in this case seamen are as a matter of law entitled to an award of salvage on the ground that the vessel had been abandoned.

2. Whether on facts uncontroverted in this case seamen are as a matter of law entitled to an award of salvage on the ground that they had been otherwise discharged from their duty to the vessel.

Statement

This is a libel in personam for an award for salvage performed by petitioners in saving from destruction by fire and explosion the oil tank vessel Esso-Copenhagen and its cargo. The vessel was owned and operated by respondent Panama Transport Company and its cargo was owned by respondent Esso Standard Oil Co. (Chile) S. A. C. [formerly West India Oil Company Chile S. A. C.] (R. 19).[1] Petitioner Lund was Chief Engineer of the vessel, petitioner Laurits Sorensen First Assistant Engineer, petitioner Jensen Third Assistant Engineer, petitioner Bertel Junior Engineer, and petitioner Arne Sorensen a fireman (R. 25).

[1] The libel was withdrawn by stipulation as to the remaining respondents (R. 19).

The case was submitted on an agreed statement of certain of the facts (R. 19 *et seq.*), documentary evidence (R. 21-22, 23, 24, 34-58),[2] and written statements which it was agreed were to be considered libelants' testimony (R. 21, 25-33).

The Court of Appeals affirmed (R. 91-92) a decree of the District Court dismissing the libel on the merits, on the ground that petitioners were not entitled to salvage (R. 83, 84).[3] The salvage claim thus dismissed arose out of facts which may be summarized as follows:

While the vessel was anchored in about fifteen fathoms of water between a quarter-mile and a half-mile offshore in the harbor of Valparaiso, Chile, loaded with 4,400,000 gallons of gasoline, aviation gasoline, naphtha and kerosene, and engaged in discharging its cargo through a discharging hose to shore pipe lines, the discharging hose broke. Escaping gasoline and vapors covered the after portion of the vessel, including the galley where a lighted stove was in use. A severe explosion and fire followed. (R. 20-21)[4]

"Flames shot high into the air and quickly covered the poop deck and part of the main deck. Though some of the tanks of the vessel were empty or partially empty, none was gas freed. The vessel seemed in imminent danger of destruction by fire and explosion." (R. 76)[5]

---

[2] Exhibits "1", "2" and "2a" (R. 24), being photostatic copies of a plan of the vessel and diagrams of its position, are on file with the office of the Clerk of this Court as original exhibits in this case.

[3] Dismissing the libel on the merits, the courts below did not dispose of a defense of the statute of limitations (R. 81-83, 91). There is no occasion, therefore, to deal with that question in this petition.

[4] Agreed statement of facts.

[5] Opinion of the District Court, to "be considered to include findings of fact * * * *" (R. 83).

What followed may be summarized by quoting from a report made within a week of the fire by respondent Esso Standard Oil Co. (Chile) S. A. C. (then West India Oil Company Chile S. A. C.), over the signature of its president, to Standard Oil Company of New Jersey (R. 36-37):

> "At the first explosion all witnesses declare that all men and officers who were on deck immediately threw themselves overboard. The Captain's report states that he gave orders for the men to throw themselves overboard. Witnesses state that the mate gave the orders to jump and that the Captain was amongst the first to jump.
>
> "The fact remains, however, that the Captain was picked up by a launch man about 20 meters from the ship in the water.
>
> "The following men, some of whom may have been below decks at the time of the explosion, did not jump and put out the fire [naming the five petitioners]. These five men were seen by all witnesses, even from shore, fighting the fire with hand extinguishers and with water hoses. The chief engineer, who evidently directed the fire fighting party, stated that it was his idea to keep the fire back as it crept forward on the starboard side, so that it would not reach the openings of the starboard tanks. The proof that he was successful in this is shown by the fact that no cargo tanks caught fire.
>
> "The crew, who had jumped into the water, plus all the officers not mentioned amongst the five who remained on deck fighting the fire, plus the workmen of the Cia. de Petroleos de Chile, plus two Chilean Navy signal men who were on board, all swam to barges or lighters of other petroleum companies which are anchored near by, or were picked by a motor launch which was waiting to take the Captain ashore at this time."

We conclude this summary statement with further quotations from the opinion (in effect, findings) of the District Court:

> "It is undisputed that everyone aboard the vessel left it except the five libellants. Lund states without

contradiction that the four co-libellants and one other seaman were below deck in the engine room when the ship caught fire and that the master and the second mate admitted to him that they did not warn these men because they believed the ship would explode before they could do so." (R. 76-77)

"Whatever inconsistency may appear in the testimony, there can not be any doubt that the ship and cargo were saved from destruction by the prompt, skilful and courageous action of the libellants. * * *" (R. 78)

"All the members of the crew and the workers who jumped overboard swam ashore or were picked up by barges, lighters or a launch which had been alongside waiting to take the master ashore. The master was picked up by a launch about twenty meters from the ship. In his log entry, he states that he tried to get hold of 'some fire-extinguishing boat' and in his October 13 report that he was transferred from the launch to a navy towboat equipped with fire extinguishers. The fire had been completely extinguished before he reached and boarded the vessel. * * *" (R. 78-79)

The above statement is based wholly on the agreed statement of facts, a contemporaneous report of the respondent Esso Standard Oil Co. (Chile) S. A. C., and the opinion (findings) of the District Court which dismissed the libel.

There remains to be noted one statement (finding) of the District Court which, we respectfully submit, is contrary to the only evidence in the record. Since this bears on the second of the questions presented by this petition, it deserves brief comment.

The opinion of the District Court states:

> "There is no indication whatsoever that libellants or any other members of the crew believed that their duty to the vessel had been ended by the abandonment" (R. 80).

We quote from the affidavit of petitioner Lund, to be treated by stipulation (R. 21) as his testimony:

> "I ran to the telephone on the bridge, called down to the engine room, got Borge Jensen and told him to come up immediately with the rest of the engineers' department, that the ship was on fire, that the Captain had ordered the ship abandoned and he expected it to explode any moment.
>
> * * * * * *
>
> "Realizing the ship was about to explode, I got the members of the engineers' department together at the side of the ship just as they were about to jump, told them they could abandon the ship and jump the way the others had done or if they were willing to stay, we might try to save the vessel. All of the engineers' department volunteered to stay except Robert Jensen, the second Assistant Engineer, who jumped overboard instead." (R. 29-30)

This testimony of petitioner Lund's is uncontroverted.

Specification of Errors to be Urged

The Court of Appeals erred:

1. In holding as a matter of law on uncontroverted facts that petitioners were not entitled to salvage.

2. In affirming the decree of the District Court dismissing the libel on the merits on the ground that petitioners were as a matter of law not entitled to salvage.

Reasons for Granting the Writ

I

The proper delimitation of the rights of seamen to salvage is of first importance to public policy. Undue liberality would discourage the performance by seamen of their

proper duty to their vessel.[6] Undue stringency would deny to seamen their just award, available to others, where their action exceeds their duty to the vessel, and would thus discourage that saving of life and property which the law of salvage is designed to promote.

In denying to petitioners, as a matter of law, the right to salvage on the uncontroverted facts in this case, the decision of the Court of Appeals exceeds in severity any of which we are aware. We shall argue below that it is probably in conflict with the decision of this Court in *Mason* v. *Ship Blaireau,* 2 Cranch 240. If that view is not accepted we urge, as an alternative reason for granting the writ, that the Court of Appeals has decided an important question of Federal maritime law which has not been, but should be, settled by this Court.

II

The rule with regard to salvage claims by seamen was stated many years ago by Mr. Justice Story in *Hobart* v. *Drogan,* 10 Pet. 108.[7] Seamen, Mr. Justice Story wrote,

> "* * * in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the perils or hardships or gallantry of their services in saving the ship and cargo. We say in the ordinary course of things; for extraordinary events may occur, in which their connexion with the ship may be dissolved de facto, or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors." (10 Pet. at 121)

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[6] One reason for a properly strict rule is that otherwise seamen might be tempted to "let the ship and cargo get into a position of danger in order that by extreme exertion they might claim salvage compensation" (*The Clarita and The Clara,* 23 Wall. 1, 17).

[7] The statement is cited by the Court of Appeals (R. 90). The decision itself, which related to a claim for salvage by a pilot whose services as such had terminated, we do not rely on as authority.

As the Court of Appeals recognized (R. 90), one way—but only one way—in which seamen may be discharged from (or exceed) their duty to the vessel may be by abandonment of the vessel.

We discuss first the issue of abandonment as it arises in this case on the uncontroverted facts, and then the uncontroverted facts from which the conclusion must be reached that petitioners were otherwise discharged from and exceeded their duty.

A

The Court of Appeals does not state precisely its criteria for determining whether there has been an abandonment of the vessel which will entitle seamen to salvage. It states first that there must be "complete abandonment of the ship without intent to return or to make any effort to save her" (R. 90), but in the following sentence quotes from *The C. P. Minch*, 73 Fed. 859, 2 Cir., a requirement of an abandonment "by all except the salvors, under circumstances which show conclusively that the abandonment was absolute, without hope or expectation of recovery." These two statements convey different meanings; and it is partly because an authoritative statement by this Court of the governing criteria appears to us to be necessary in the public interest that we urge the granting of the writ.

Whichever alternative is adopted, however, we submit that in this case the only permissible legal inference from the uncontroverted facts is that there was a "complete" and "absolute" abandonment of the vessel, and that in reaching the contrary conclusion the Court of Appeals erred as a matter of law. The Court of Appeals wrote:

> "There is no doubt that in the confusion following the outbreak of the fire the captain's first thought was to get what men he could off the ship, but things happened too fast to make it clear from the evidence that his abandonment of the ship was more than temporary

> to save lives. His efforts to get fire fighting aid and return to the ship with it are some indication that there was no final abandonment. And it is to be remembered that the ship was in harbor where efforts on his part to return with help for saving the ship would not inevitably prove futile, as they might well have been had the fire occurred when the vessel was at sea. After due consideration of all the circumstances shown, the trial judge concluded that the fact of final abandonment of the vessel had not been established by at least a preponderance of the evidence. * * * we see no justification for reversing the holding below that the libellants failed to establish that there was a final abandonment of the vessel." (R. 90-91)

These arguments and this conclusion of law, we submit, ignore the essential uncontroverted facts. When the master and all the officers and men on deck other than petitioner Lund threw themselves overboard (on orders of the master or the mate), it was in the expectation that the vessel was about to explode. That, indeed, is the only possible explanation of the master's and mate's having gone overboard without taking time to warn the five (including the other four petitioners) who were below deck in the engine room. The record can support one conclusion only: that the anticipated imminent destruction of the vessel would in fact have occurred, had it not been that the vessel was "saved from destruction by the prompt, skilful and courageous action of the libellants" (p. 5, *supra*). When the master returned to the vessel the fire was already out. There is no permissible conclusion from the uncontroverted evidence but that, had it not been for the action of the petitioners, there would have been no vessel for the master to return to.

On these uncontroverted facts, we submit that the statement of the Court of Appeals quoted above, that petitioners had not shown that the master's efforts "would not inevitably prove futile", lacks any real meaning. The concept

of "inevitable futility", moreover, goes beyond any authority of which we are aware.

B

As we have noted above (p. 8), the Court of Appeals recognized that abandonment of a vessel is only one way in which seamen may be discharged from (or exceed) their duty to the vessel; and, indeed, the Court of Appeals quoted from *The C. P. Minch, supra,* to the effect that discharge from the service of the shipowner is an alternative ground for permitting recovery of salvage (R. 90). But in its disposition of the case the Court of Appeals ignored this alternative, stating that:

> "* * * decision here turns upon whether the libelants have shown that their duty to the ship as members of its crew was ended before they put out the fire *by proving* circumstances which show *that the abandonment was absolute* * * *" (R. 90; italics added).

That the initial statements of the Court of Appeals were correct, and its disposition of the case in disregard of those statements wrong, is we submit clear. See *The Umattilla,* 29 Fed. 252, N. D. Cal., especially pages 258-9.

On the uncontroverted evidence, the entire ship's complement (other than the men in the engine room) were ordered overboard by the master or mate, who themselves went overboard with all on deck but petitioner Lund. He in turn, having called the men in the engine room to the deck, told them of the order to abandon ship. One did so, but the other four petitioners volunteered to remain with Lund and fight the fire. It is, we submit, incontrovertibly clear that they had been discharged from their duty to the vessel by the words and action of the master and mate, and that their remaining on board and extinguishing the fire, at imminent risk to their own lives, was in excess of duty.

III

In *Mason* v. *Ship Blaireau,* 2 Cranch 240, this Court affirmed an award of salvage to one Toole, a seaman on the salvaged ship. The Blaireau had been run down and damaged by a Spanish ship. The officers and men of The Blaireau, other than Toole, were taken on board the Spanish ship and departed. Whether Toole remained of his own free will or, as was suggested, could not be found when the others left does not clearly appear. Toole kept The Blaireau afloat until the next day, when she was found and boarded by another ship; and she was ultimately saved. This Court affirmed a decree awarding to Toole part of the salvage award. The Court, through Chief Justice Marshall, wrote:

> "There was certainly no individual, who assisted in bringing in the *Blaireau,* that contributed so much to her preservation as *Toole.* Every principle of justice, and every feeling of the heart, must arrange itself on the side of his claim.
>
> "But it is contended, that the contract he had entered into bound him to continue his endeavours to bring the vessel into port, and that the principles of general policy, forbid the allowance of salvage to a mariner belonging to the ship which has been preserved.
>
> "The claims upon him, on the ground of contract, are urged with a very ill grace indeed. It little becomes those who devoted him to the waves to set up a title to his further services. The captain, who was entrusted by the owner with power over the vessel and her crew, had discharged him from all further duty under his contract, as far as any act whatever could discharge him, and it is not for the owner now to revive this abandoned claim.
>
> "Those principles of policy which withhold from the mariners of a ship their wages on her being lost, and which deny them salvage for saving their ship, however

great the peril may be, cannot apply to a case like this.—There is no danger that a single seaman can be induced or enabled, by the prospect of the reward given to *Toole,* to prevail on the officers and crew of a vessel to abandon her to the mercy of the waves, for the purpose of entitling the person who remains in her to salvage, if she should be fortunately preserved." (2 Cranch at 269-270)

The decision of the Court of Appeals is, we submit, probably in conflict with that decision of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. BENJAMIN,
ABRAHAM FISHBEIN,
ROBERT T. TATE,
JEROME Y. STURM,
Counsel for Petitioners.

June, 1953.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 75-83) is reported in 109 F. Supp. 795. The opinion of the Court of Appeals (R. 87-91) is reported in 202 F. 2d 247.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

Question Presented.

Whether the petitioners are entitled to an award of salvage for services rendered, on the ground that their vessel had been abandoned and they had been discharged from their vessel, prior to the performance of the services.

The question has been decided unanimously against the petitioners by both the District Court and the Court of Appeals.

Statement.

This is an action in admiralty by five of the former crew members of the SS *Esso Copenhagen* against the owner of the *Esso Copenhagen* and the owner of the cargo laden thereon, for alleged salvage services rendered their vessel in October, 1939.

The facts which gave rise to the alleged salvage claim:

For the Court's convenience we here set forth some of the highlights of the facts giving rise to this alleged salvage claim, all of which facts are covered in greater detail in the several exhibits which were offered in evidence on the submission of the case, and which are contained in the Transcript of Record.

On October 10, 1939, the *Esso Copenhagen* was, while secured to mooring buoys in the Harbor of Valparaiso, Chile, discharging her cargo to shore tanks, the shore lying about one-quarter mile directly astern of the vessel. The discharging was taking place via a discharging hose which led along the deck and over the stern of the vessel to shore pipes which extended out from the shore approximately one-quarter of a mile and ended in close proximity to the stern of the vessel.

Between 12:30 and 1:00 P. M. on October 10th the discharging hose on deck ruptured. Escaping gasoline and gasoline vapors covered the after portion of the ship and in particular were in proximity to the galley, wherein a lighted stove was in operation. This lighted stove was the direct cause of a severe explosion and fire which ensued. The cargo pumps were immediately stopped, but the cargo which then was in the hose and which necessarily spilled out on the after deck of the *Esso Copenhagen* served as sufficient fuel to maintain a sizable fire. Due to wind conditions, the flames were being gradually carried forward on the vessel. The master and the majority of the officers and crew were in the vicinity of the midshiphouse of the tanker. Seeing the flames approach and not being able to see the source of the fire, the master of the *Esso Copenhagen* ordered his vessel abandoned. In accordance with the order, all of the ship's personnel, with the exception of the five men who were then below decks in the engine room, left the *Esso Copenhagen*.

Some short time after the commencement of the fire, the engineering personnel came from below and found themselves in a position from which they were able to survey the situation completely. Under the able leadership of the chief engineer, one of the petitioners herein, they set about fighting the fire, the details of which are contained in the several reports included in the Transcript of Record.

After leaving the vessel, the captain and the other officers and crew were picked up by launches. The master had himself transferred to a tug, which was equipped with fire-fighting equipment, and returned to the vessel at about the time the engineering personnel of the *Esso Copenhagen* had the fire under control.

The case before the Court consists of a claim for salvage by some of the engineering crew of the *Esso Copenhagen*

who remained aboard the vessel and assisted in extinguishing the fire.

The case was submitted on an agreed statement of facts (R. 19 *et seq.*), which facts were completely reviewed and analyzed by the District Court in its opinion (R. 75 *et seq.*), wherein, in concluding, the Court stated:

> "There is no indication whatsoever that libellants or any other members of the crew believed that their duty to the vessel had been ended by the abandonment." (R. 80)
>
> • • • • • •
>
> "After the captain jumped overboard and was picked up by a launch, he sought to return to his ship with fire-fighting equipment. While the fire was extinguished before he boarded the vessel, the entire episode apparently lasted only half an hour. Under the circumstances, it is doubtful that the master acted as though he had no reasonable hope of recovering the ship in any event and libellants have not sustained their burden of proving that the *Esso Copenhagen* was abandoned without hope of return or expectation of recovery. The *Lyman Abbott, supra,* at pages 789, 796." (R. 81)
>
> • • • • • •
>
> "In any case, however, the court is of the opinion that libellants' claim must be dismissed on the merits.
>
> "Although the libellants displayed extraordinary courage and an exemplary sense of duty to the ship and their employer, it can not be held that they were or considered themselves as volunteers rather than seamen acting in the performance of their duty, hazardous as it may be. • • •" (R. 83)

Thereafter, the petitioners herein moved in the District Court for a reargument, which motion was denied.

On appeal, the case was reviewed in its entirety by the Court of Appeals for the Second Circuit, which rendered a unanimous decision affirming the District Court. (R. 87 *et seq.*)

The Court of Appeals stated in part as follows:

> "Since all of these libellants were members of the crew when the fire broke out on the vessel, they must show in order to recover salvage for what they did, however meritorious their conduct may have been, that they had been discharged from their obligations as such to the ship before they put out the fire. Their duty to do the best they could for their ship arose from the nature of their employment and continued while that employment lasted and its fulfillment entitled them to no additional compensation by way of salvage or otherwise. The general rule in that respect remains as Mr. Justice Story stated in *Hobart* v. *Drogan (The Hope)*, 10 Pet. 108, 121." (R. 89, 90)
>
> • • • • • •
>
> "So decision here turns upon whether the libellants have shown that their duty to the ship as members of its crew was ended before they put out the fire by proving circumstances which show that the abandonment was absolute. They had the burden of proof as to that." (R. 90)
>
> • • • • • •
>
> "After due consideration of all of the circumstances shown, the trial judge concluded that the fact of final abandonment of the vessel had not been established by at least a preponderance of the evidence. Since all of the evidence was documentary or by deposition and the trial judge did not hear or see the witnesses, we are in as good a position as the lower court to evaluate it. Although under these circumstances, the 'clearly erroneous' doctrine is not

> applicable, * * * we see no justification for reversing the holding below that the libellants failed to establish that there was a final abandonment of the vessel." (R. 91)

Thereafter, petitioners petitioned for a rehearing (R. 93 *et seq.*), which petition was denied (R. 106).

Argument.

The issue in the present case is entirely factual and no amount of strained semantics can convert it into one warranting review of this Court on certiorari. This case was but a simple application of the facts therein to the legal principle or yardstick enunciated by Mr. Justice Story in *Hobart* v. *Drogan, supra,* wherein the court stated:

> "* * * in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the perils or hardships or gallantry of their services in saving the ship and cargo. We say in the ordinary course of things; for extraordinary events may occur, in which their connexion with the ship may be dissolved *de facto,* or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors." (10 Pet. at 121)

The petition states that there is a difference between what the court, in defining abandonment, has said in the instant case and what it many years previously stated in *C. P. Minch,* 73 Fed. 859. Herein, the court stated, in defining what would constitute abandonment sufficient to discharge seamen so that thereafter their services to the vessel would be considered voluntary and accordingly they

would be entitled to share as salvors, that such an abandonment must be "complete abandonment of the ship without intent to return or to make any effort to save her." (R. 90). In *C. P. Minch,* in laying down the same criteria, the court, we submit, used a definition differing slightly in wording but at all times exactly the same in meaning and connotation. Therein the court said that a requirement of an abandonment was one "which shows conclusively that the abandonment was absolute without hope or expectation of recovery." The petitioners apparently are merely playing with words in attempting to lead this Court to believe that the Court of Appeals for the Second Circuit has given contrary opinions. We submit that there is no conflict between the instant case and the *C. P. Minch (supra.).*

The petitioners further allege a conflict between the instant case and *Mason* v. *Ship Blaireau,* 2 Cranch 240. The *Mason* case was one entirely different on the facts. Therein, the officers and crew of the *Blaireau,* with the exception of the claimant Toole, did abandon that ship and thereafter made no effort whatsoever to again return to her to render assistance or to take possession. The master, officers and crew of the *Blaireau,* with the exception of Toole, showed by their acts a clear, definite and final abandonment of the vessel, not so much in their actions at the time of leaving the ship, but in their failure to make any effort whatsoever again to return to their ship to render assistance. Apparently the petitioners are well aware of this distinction, which gave rise to their summation of this point by stating, "The decision of the Court of Appeals is, we submit, probably in conflict with that decision of this Court." Again we submit there is no conflict between the instant case and the *Mason* case (*supra.*).

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Raymond T. Greene,
Of Counsel.

July 22, 1953.

HAROLD B. WILLEY, CLERK

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REPLY BRIEF FOR PETITIONERS

ROBERT M. BENJAMIN,
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Petitioners,

against

PANAMA TRANSPORT COMPANY, ESSO STANDARD OIL CO. (Chile) S.A.C., formerly WEST INDIA OIL COMPANY CHILE S.A.C., STANDARD OIL COMPANY (N. J.) and STANDARD OIL COMPANY OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

1. The facts on which petitioners rely are uncontroverted.

For the purpose, presumably, of creating apparent issues of fact where none exist, the respondents' brief in opposition resorts to imaginative supplementation of the record,—necessarily without the record references which the rules of this Court prescribe. For example:

(a) The brief in opposition states (p. 3):

> "* * * Seeing the flames approach and not being able to see the source of the fire, the master of the *Esso Copenhagen* ordered his vessel abandoned. * * *"

and further

> "Some short time after the commencement of the fire, the engineering personnel came from below and

found themselves in a position from which they were able to survey the situation completely. * * * "

There is not a word in the record to support the statement that the master was not "able to see the source of the fire" or that the petitioners (when four of the five came from below) were in any better position "to survey the situation completely" than the master had been. The master's own report to respondent Panama Transport Company states:

> "At 0.45 pm Octobre the 10 the hose burst and the excaping gasolin caught fire and set fire on the poop-deck.
>
> "The flames immediately covered the whole after-ship and the maindeck as far as to No. 7 Tank.
>
> "Also the surrounding water was covered by flames, and * * * it was my judgment, that the cargotanks would explode * * *." (R. 41; see also the master's deck log, R. 48.)

Nowhere does the master suggest any doubt that he knew exactly what had happened and was happening.

(b) The brief in opposition states (pp. 3-4) that the petitioners "assisted in extinguishing the fire". All the evidence is that the petitioners extinguished the fire unassisted. In addition to the evidence recited at pages 4-5 of the petition, we refer to a report of Lago Oil & Transport Company, Ltd., made in response to a request of the marine manager of respondent Panama Transport Company (R. 45-47). The Lago report states:

> "It was clearly established that the Chief Engineer and the four members of the engine department showed a very remarkable presence of mind, and by fighting the fire undoubtedly saved the ship. * * * " (R. 44)*

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* See also the opinion of the Court of Appeals (R. 88):

> "* * * The fire had lasted about half an hour and had been extinguished through the heroic efforts of the libellants. * * * "

2. The questions presented are questions of law.

Seamen are entitled to salvage if their vessel has been, in the necessary legal sense, "abandoned", or if they have been otherwise, in the necessary legal sense, "discharged from their duty to the vessel". How these tests are met is, clearly, a question of law. It is none the less so because such questions of law have content only with reference to fact situations. Where, as here, the facts are uncontroverted, only the question of law remains.

It is of first importance that the questions of law raised by this case should be settled by this Court. The brief in opposition suggests no valid argument to the contrary.

Respectfully submitted,

ROBERT M. BENJAMIN,
ABRAHAM FISHBEIN,
ROBERT T. TATE,
JEROME Y. STURM,
Counsel for Petitioners.

August, 1953.

MOTION FILED OCT 21 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 139

ERIK A. BERTEL, LAURITS SORENSEN, BORGE A. R. JENSEN, HENRY L. LUND and ARNE SORENSEN,

Petitioners,

against

PANAMA TRANSPORT COMPANY, ESSO STANDARD OIL CO. (Chile) S.A.C., formerly WEST INDIA OIL COMPANY CHILE S.A.C., STANDARD OIL COMPANY (N. J.) and STANDARD OIL COMPANY OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE PETITION

and

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ROBERT M. BENJAMIN,
ABRAHAM FISHBEIN,
ROBERT T. TATE,
JEROME Y. STURM,
Counsel for Petitioners.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court, entered on October 12, 1953, denying the petition for a writ of certiorari in this case. The annexed petition is based on a ground not specified in paragraph 2 of Rule 33, and counsel are thus unable to certify that the petition is restricted to the grounds therein specified. The granting of

the petition being, nevertheless, within the inherent power of the Court, petitioners respectfully request that the Court exercise its power to entertain the petition.

ROBERT M. BENJAMIN,
ABRAHAM FISHBEIN,
ROBERT T. TATE,
JEROME Y. STURM,
Counsel for Petitioners.

October 20, 1953.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 139

ERIK A. BERTEL, LAURITS SORENSEN, BORGE A. R. JENSEN, HENRY L. LUND and ARNE SORENSEN,

Petitioners,

against

PANAMA TRANSPORT COMPANY, ESSO STANDARD OIL CO. (Chile) S.A.C., formerly WEST INDIA OIL COMPANY CHILE S.A.C., STANDARD OIL COMPANY (N. J.) and STANDARD OIL COMPANY OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that this Court grant rehearing of its order of October 12, 1953, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit as prayed for in the petition filed herein on June 23, 1953.

The order entered October 12, 1953, recites that "Mr. Justice Douglas and Mr. Justice Jackson are of the opinion certiorari should be granted." Since such recitals on the denial of writs of certiorari do not necessarily reflect the full vote in favor of issuance, it is possible that there were three votes in favor.

The Journal of Proceedings of the Court on October 12, 1953, as reported in "The United States Law Week", contains also the following statement by Mr. Chief Justice Warren:

> "The Chief Justice having taken office on the day the matters to be reported on today were considered by the Court in conference, and having no familiarity with the records, did not participate in consideration of them."

Petitioners respectfully urge that the questions of law presented by this case are of sufficient importance to justify reconsideration by the full Court of its order denying the petition.

The subject-matter, the proper delimitation of the rights of seamen to salvage, has not so far as we are aware been the subject of decision by this Court since the time of Chief Justice Marshall, nor the subject of consideration by this Court in the present century. For the reasons stated in the petition, it is of first importance to public policy that the law in this field be settled by this Court in such a way as to safeguard the ends which the law of salvage is designed to promote, and that in so doing this Court correct the decision of the Court of Appeals in this case, which exceeds in severity any of which we are aware.

It is respectfully urged, therefore, that rehearing be granted, that the petition for a writ of certiorari be considered by the full Court, and that upon such consideration a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

ROBERT M. BENJAMIN,
ABRAHAM FISHBEIN,
ROBERT T. TATE,
JEROME Y. STURM,
Counsel for Petitioners.

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ROBERT M. BENJAMIN,
ABRAHAM FISHBEIN,
ROBERT T. TATE,
JEROME Y. STURM.